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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

BOHUMIL J. DUSANEK,

*Petitioner,*

vs.

JOHN O'DONNELL, M.D., and the BOARD OF EDUCATION OF THE CITY OF CHICAGO,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether a tenured public school teacher may be forced to take an illness leave of absence for failing to meet the medical standards of his employer without being told any reasons for his failure to meet such standards.

2. Whether the failure of a tenured public school teacher to submit himself to a hearing for dismissal for cause from his employment bars him from commencing suit in federal court for a denial of due process in forcing him to take an illness leave of absence for reasons which are not disclosed to him.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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*To: The Justices of the Supreme Court of the United States:*

Petitioner, Bohumil J. Dusanek, respectfully prays that a Writ of Certiorari issue to review the decision and order of the United States Court of Appeals for the Seventh Circuit, reversing the decision of the United States District Court for the Northern District of Illinois.

Petitioner, Bohumil J. Dusanek, is a tenured teacher employed by the Board of Education of the City of Chicago, Illinois. He was required to undergo a psychiatric examination by a doctor employed by the Board. Subsequent to the examination he was informed, without explanation, that he did not meet the medical standards

of the Board of Education. He was informed that he should take an illness leave of absence and that if he did not, the Board would bring charges against him seeking his dismissal for cause.

Petitioner placed himself on an illness leave of absence and filed suit in the United States District Court for the Northern District of Illinois pursuant to 42 U.S.C. §1983, alleging deprivation of due process and equal protection. After a jury trial, judgment was rendered for Petitioner in the amount of $100,000.00 against Respondents. The United States Court of Appeals for the Seventh Circuit reversed, finding that since Petitioner took the illness leave of absence and had not submitted himself to a dismissal hearing for cause, he had not been denied any property rights without due process.

Petitioner's Petition for Rehearing was denied.

## OPINIONS BELOW

The United States District Court for the Northern District of Illinois rendered no opinion in entering judgment for Petitioner in the amount of the jury verdict, plus costs and attorneys fees. The Order rendering judgment is attached hereto as Exhibit A. The opinion of the United States Court of Appeals for the Seventh Circuit, rendered on April 26, 1982, is reported at 677 F.2d 538 (1982). That Opinion is reproduced as Appendix B to this Petition. The Court of Appeals rendered no opinion in denying Petitioner's Petition for Rehearing. The Order denying that Petition is attached hereto as Appendix C.

## JURISDICTION

The United States Court of Appeals for the Seventh Circuit denied Petitioner's Petition for Rehearing on June 28, 1982. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

## STATEMENT OF FACTS

Bohumil J. Dusanek began his employment as a teacher with the Board of Education of the City of Chicago in September, 1958. In 1961, he obtained a regular certificate and was appointed to a full-time position as a teacher of Business Education. Petitioner subsequently obtained tenure pursuant to the Illinois School Code, Ch. 122, Ill. Rev. Stats. §34-85.

From September 1964, through March, 1977, Petitioner was assigned to a teaching position at the Schurz High School. For each of those thirteen years Petitioner received "excellent" or "superior" ratings of his teaching ability by the Principal based on the latter's observations of his actual performance.

On March 2, 1977, Mr. Dusanek brought the name of a student, Laura Callan, to the Principal's attention due to the student's record of excessive absences, alternating with periods of disruptive attendance. Petitioner also informed the Principal of his belief that he recognized Laura Callan as being a student who had previously attended his class during 1967, 1968 or 1969, often in the company of a tall girl dressed in bib overalls. He recalled the pair as being disruptive to the class. Dr.

Maloney directed Petitioner to summarize his observations in a memo, which he did.

By reviewing school records, Dr. Maloney determined Laura Callan's date of birth to have been in April, 1960, making it unlikely that she had been at Schurz during the time period Petitioner recalled. Dr. Maloney then conducted an "investigation" of Mr. Dusanek's behavior. This investigation consisted only of canvassing members of the school staff as to rumors about the Petitioner. Two teachers, Mr. Preo and Mrs. Horan, each reported an incident, both of which were alleged to have occurred approximately ten years earlier. Although without personal knowledge as to the truth of these statements, Dr. Maloney concluded the investigation, discussing neither of them with Petitioner.

Based on the single conversation which he had with Petitioner regarding Laura Callan and those reported incidents of Petitioner's behavior a decade earlier, Dr. Maloney requested a complete health examination for Petitioner (both physical and mental) by the Board's Bureau of Teacher Personnel pursuant to Board Rule 4-44, which provides in pertinent part:

> "The General Superintendent . . . shall have authority to require a health examination by a medical examiner selected by him of any employee under his control or supervision whenever, in his judgment, there seems to exist any disability which might impair the efficiency of such employee. . . ."

The principal's request that Petitioner be scheduled for a health examination was received by Raymond C. Principe, Director of the Board's Bureau of Teacher Personnel. When he received this request, he knew nothing of the nature of the supposed disability of Petitioner which might impair his efficiency, nor the nature of the examination being requested. Mr. Principe directed his secretary to prepare a form letter dated

March 14, 1977, for signature by the General Superintendent of Schools, directing Petitioner to report to the Board's offices on March 28, 1977, for a "health examination." The letter contained no explanation of the term "health examination". The form letter was submitted to the General Superintendent for signature unaccompanied by any written or oral communication apprising the Superintendent of any facts or reasons justifying the initiation of the request for examination. The communication to Petitioner specified neither reasons for the directive nor standards by which Petitioner would be measured in the evaluation of his "health."

According to the Director of Teacher Personnel, the medical standard for teaching in the Chicago Public Schools is enunciated in Board Rule 44-4, which allows a principal to request a health examination when he is of the opinion that an employee has a disability which affects his efficient performance.

Respondent Dr. John O'Donnell is employed by the Board of Education as a consulting psychiatrist. He conducted psychiatric portions of health examinations ordered pursuant to Board Rule 44-4 by interviewing teachers and rendering psychiatric evaluations. Dr. O'Donnell commenced his evaluation of Petitioner by telephoning the Principal to discuss the reason for the Dusanek referral. Dr. O'Donnell's examination of the Petitioner consisted of asking Mr. Dusanek if he knew why he had been summoned to an examination, questioning Petitioner about some of the incidents related to him by the Principal, and inquiring of him as to his interests and hobbies. Dr. O'Donnell also "questioned him about other things, not too specifically." This examination lasted approximately forty-five minutes.

During the examination Dr. O'Donnell requested that Mr. Dusanek execute releases to enable Dr. O'Donnell to

speak with Petitioner's orthopedic surgeon and psychiatrist, which Petitioner did. Prior to making the determination that Petitioner should be relieved of his teaching duties and directed to take a leave of absence, Dr. O'Donnell did not consult with Petitioner's psychiatrist, Dr. Garth Smith.

Based solely on the above-described "examination" and the history received from the Principal, Dr. O'Donnell concluded that Petitioner did not get along with the Schurz School staff and could not develop healthy personal relationships with his students. Dr. O'Donnell at no time actually observed Petitioner's behavior in the classroom, or in any context other than his office interviews. Dr. O'Donnell discussed Petitioner's teaching performance and professional demeanor with no one other than the principal and Petitioner himself. Thereafter, Petitioner was advised that he did not meet the medical standards for teaching in the Chicago School system. Petitioner immediately wrote a letter to Medical Director Dr. Abrams, dated April 5, 1977, in which he requested an opportunity to discuss the examination and asked "why have I failed?". He received no response.

Following Petitioner's request for a re-examination, in July, 1977, Dr. O'Donnell conducted a second evaluation of Mr. Dusanek. At the conclusion of the examination, which was conducted in the same manner as the first, Dr. O'Donnell concluded that Petitioner's "delusional system had spread with regard to the principal and the school," and that he did not meet the Board's standards for teaching. At no time did Dr. O'Donnell identify for Mr. Dusanek the "emotional problems" from which Dr. O'Donnell concluded Petitioner suffered and which supposedly impaired his ability to teach. Nor did he advise Mr. Dusanek of what was required of him in order to remedy his deficiencies to meet the Board's medical standards.

At trial, Dr. O'Donnell testified that Mr. Dusanek would "have problems" if he were allowed to continue teaching, but could not state or predict any specific problems. Dr. O'Donnell admitted that persons who have psychiatric or emotional problems should not necessarily be precluded from teaching school solely on the existence of those emotional problems. He further testified that he made no diagnosis or prognosis of Petitioner's condition, despite the fact that he understood that on the strength of his report Petitioner would be prevented from teaching in the Chicago Public Schools until such future time as he successfully passed a health examination or conditions had changed.

Following Petitioner's second examination by Dr. O'Donnell in July, 1977, Principe informed Petitioner by letter dated August 19, 1977, that he still "did not meet the medical standards required for teaching in the Chicago Public Schools." Pursuant to the Board directive and along with this notification, Petitioner received a form to be used to request an illness leave of absence. The notification to him stated that if he did not execute the request for illness leave of absence within ten business days, it would be recommended to the Board of Education that his services be terminated in accordance with State statute.

The applicable state statute, Ch. 122, Ill. Rev. Stats. §34-85, provided at the time that charges for dismissal be preferred by a vote of the majority of the Board of Education, which then would appoint a committee of three of its members to hold a hearing thereon. Believing his job to be in jeopardy, Mr. Dusanek at that time executed the Request for Illness Leave of Absence. His uncompensated leave of absence became retroactively effective as of March 29, 1977.

Illness leaves of absence from active duty in the Chicago public schools are defined and controlled by the

language of Board Rule 4-44 and Article 33 of the collective bargaining agreement between the Board of Education and the Chicago Teachers Union. Leaves of absence are granted under this rule in periods of five school-month blocks, to a maximum of twenty-five school months. A teacher on an illness leave may terminate the leave prior to the natural expiration of the five-month period only by written request to and approval of the Department of Personnel. Upon return from a leave of a duration in excess of five school-months, a teacher is required to pass a health examination performed by the Board's medical department. If he does not pass such examination, the teacher may request an additional medical opinion in the manner provided in Board Rule 4-19. Resort to the Rule 4-19 procedure which guarantees an impartial medical opinion is available under Rule 4-33 only to a teacher seeking reappointment after the expiration of the initial five-month leave period.

Pursuant to Rule 4-33 and other contractual provisions, certain benefits inure to a teacher while on an approved illness leave of absence. The teacher is entitled to the payment by his employer of the full premium cost of insurance, individual or family insurance plans, (Art. 32); that portion of the leave for which sick pay is received is not considered to be a break in service for any purpose; the entire leave is not to be construed as a break in service for seniority purposes; the teacher's position is protected for the first five-month period; after five months the position is declared vacant, but the teacher retains entitlement to immediate reassignment to a vacant position equal in rank upon return to active service.

No extensions of leave are granted beyond a total of twenty-five school months. At the end of that period a teacher may request reappointment, which is conditioned upon the successful passing of a health examina-

tion. Alternatively, a teacher may resign. If the teacher refuses to resign he is charged with being "absent without leave", is deemed to have abandoned his employment and to have surrendered all rights of tenure and is subject to summary dismissal from the Board. (Rule 4-41).

On October 27, 1977, Petitioner filed suit in the United States District Court for the Northern District of Illinois, pursuant to 42 U.S.C. §1983 alleging that the Board, through its employees, had deprived him of property in his employment without due process of law. On May 6, 1980, after trial, the jury rendered a verdict in favor of Petitioner against the Board and Dr. O'Donnell in the sum of $100,000.00. Judgment was rendered on the verdict, and Petitioner was subsequently granted attorneys fees by the District Court.

On appeal, the United States Court of Appeals for the Seventh Circuit reversed. While that Court did not find that the verdict of the jury was against the manifest weight of the evidence, it held that Petitioner had not been denied property without due process. The crux of the Court's opinion was a finding "that it is not a deprivation of due process of law to be put to the option of defending oneself in a proper dismissal hearing or voluntarily accepting a change in one's job status, when the state's action in first initiating the medical investigation is reasonable and in full compliance with the conditions of the teacher's tenure." The Court specifically held that requiring Petitioner to undergo a dismissal proceeding was not a requirement that he exhaust administrative remedies, but rather, that the State had made a procedural protection available to Petitioner which he had refused to utilize.

It is this ruling which Petitioner requests this Court to review.

## REASONS FOR GRANTING THE WRIT

### I.

### A FORCED ILLNESS LEAVE OF ABSENCE IS A DEPRIVATION OF PROPERTY.

The touchstone of due process is fundamental fairness. Petitioner has been denied that basic fairness to which all persons are entitled from governmental employers. The jury in this case, pursuant to proper instructions, so found. In direct contravention of this Court's admonitions, the United States Court of Appeals has set aside that finding and verdict in Plaintiff's favor. The Court of Appeals has held that the illusion of due process is sufficient, even though its substance has been denied.

Last term this Court reaffirmed its unbroken series of holdings, again reiterating that resort to the Courts for redress of constitutional deprivations under 42 U.S.C. §1983 is not to be conditioned upon exhaustion of administrative remedies. *Patsy v. Board of Regents of the State of Florida*, ..... U.S. ....., 102 S.Ct. 2557 (1982). Despite this reaffirmation of that long-established principle, the Court of Appeals has attempted to evade that principle by a neat piece of legerdemain. Such an evasion must not be countenanced by this Court if public employees are to retain their constitutional rights.

As is set forth more fully above, Petitioner is a tenured teacher within the Chicago Public School system. As such, he can be discharged from that employment only for "cause." Ch. 122, Ill. Rev. Stats. §34-85. Illinois law further declares that temporary medical disability is not a cause for discharge. Ch. 122, Ill. Rev. Stats., §10-22.4. In line with that statutory direction and guidelines for "just cause", the Chicago Board of Education has adopted rules and regulations which provide

that a teacher who is temporarily disabled due to illness is entitled to take an illness leave of absence, in periods of up to five months duration. Board of Education Rule 4-33. During that period of time, the teacher's position as an employee is protected, and certain fringe benefits continue to be provided, most notable of which is medical insurance coverage.

The ruling of the Court of Appeals here, however, decrees that where a teacher wishes to contest an attempt by the Board of Education to force him into taking such a leave of absence, he must relinquish those substantial benefits by testing that leave under the Tenure Dismissal Act. Ill. Rev. Stat. Ch. 122, §34-84 through 34-85. The Court of Appeals has held that the Board properly forced Petitioner to make an election—either take an illness leave of absence, or submit himself to dismissal from his position—with no standards whatsoever upon which to make such a serious decision.

Petitioner was notified that he was required to undergo a complete medical examination. When he arrived at the medical offices of the Board of Education, he was given a perfunctory physical examination, after which he was ushered into the presence of a psychiatrist. He was not told why he was there. After a short interview he was told to leave. Shortly thereafter he was informed that he did not meet the "medical standards" of the Board of Education. He was not told what those standards were. He was not told why he did not meet those standards. In fact, no such standards exist, either in writing or any other form. At best, those standards are what the doctor at the time solely decides.

He was then informed that if he did not submit to an illness leave of absence, the Board would move to dismiss him from his teaching position. Not knowing what he was charged with, or why he was being forced to make such a decision, Petitioner was put to a Hobson's

choice: either acquiesce to an illness leave of absence without pay, or face suspension from duty without pay until charges and a hearing could be held. He chose the option of taking an illness leave of absence, and filing this suit.

The jury found there was no reason for forcing Petitioner to take an illness leave of absence—i.e., the accusations against him were untrue. Yet, the Court of Appeals holds that by not submitting himself to an unrelated tenure dismissal hearing, he has forfeited his right to be heard in the courts. In short, the Court of Appeals would force Petitioner to give up certain statutory and contractual rights and benefits in order to obtain due process. Such an approach has been consistently condemned.

The decision of the Court of Appeals here is contrary to the spirit of the decisions of this Court, and the rulings of every other Circuit Court which has considered this issue. It holds that so long as the Board of Education was prepared to give Petitioner some kind of hearing, due process has been satisfied. But that is not the holding of this Court. The kind of process which is due depends upon the deprivation which is contemplated. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976).

It is now well settled "that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment." *Fuentes v. Shevin*, 407 U.S. 67, 84, 92 S.Ct. 1983 (1972). The State of Illinois has recognized that temporary medical disability is not a cause for termination. 122 Ill. Rev. Stats. §10-22.4. In accord with that obviously correct policy, the Board of Education has promulgated its rule 4-33 which allows a teacher to seek a leave of absence, which must be passed upon by the Superintendent of Schools. Absence pursuant to such leave "shall not be construed as a break in service of such person on leave so far as senior-

ity of service is concerned . . . [and] shall not be construed as a break in service for any purpose." Board of Education Rule 4-33. In addition, such a person retains his tenure rights and continues to have his medical benefits insurance in force during the leave period as provided in the collective bargaining agreement between the Board of Education, City of Chicago and the Chicago Teachers Union, Article 32-1.1. Further, such medical benefits would *not* be available to Petitioner if he was suspended and charged with dismissal under Chapter 122, Ill. Rev. Stats. §34-85.

It is well established that before such a leave may be forced upon a person, due process is required. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S.Ct. 791 (1974); *Lombard v. Board of Education*, 502 F.2d 631 (3d Cir. 1974). Before such a leave may be imposed, notice and a hearing which is likely to establish the validity of the deprivation is required. *Bell v. Burson*, 402 U.S. 535, 539-42, 91 S.Ct. 1586 (1971). No such opportunity was presented to Petitioner before he was required to decide whether to relinquish the rights attendant to a medical leave or face a dismissal hearing which might strip him of his career, tenure rights and future economic and medical benefits.

It is fundamental that a person may not be required to make an uniformed decision as to whether to relinquish a right. No system of justice can survive if it comes to depend on its citizens' forced abdication through unawareness of their constitutional rights. *Escobedo v. State of Illinois*, 378 U.S. 478, 490, 84 S.Ct. 1758, 1764 (1964). Notice of the reasons for a contemplated action is the first step of due process. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 574, 92 S.Ct. 2701, 2707 (1972). Here, Petitioner was required to decide whether to relinquish property rights which he would have on a leave of absence status without any information whatso-

ever as to why he did not meet the medical standards of the Board of Education, or what he would have to do in order to bring himself into compliance. Obviously, no one could make such a decision in an informed manner. Requiring such an election is a violation of the fundamental precepts of due process. *Freitag v. Carter*, 489 F.2d 1377, 1382 (7th Cir. 1973).

Furthermore, the very decision that Petitioner was mentally unqualified to meet the medical standards of the Board of Education adversely impacted his liberty. *Newman v. Board of Education of City School District of New York*, 594 F.2d 299, 305 (2d Cir. 1979). Certainly such an allegation would not only deprive Petitioner of present government employment, but also of future opportunity for employment there or elsewhere. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 185, 71 S.Ct. 624, 655.

The refusal of the Board of Education to inform Petitioner of any information which was the basis for the determination of mental unfitness to teach is the kind of egregious action against which the Constitution protects. As was found in *Newman v. Board of Education of City School Districts of New York, supra*, the failure to provide such vital information is a denial of rudimentary fairness. 594 F.2d at 305. See also *Freitag v. Carter, supra*, at 1382.

Clearly, the Court of Appeals has ignored this aspect of the case. It has taken a limited view of the requirements of due process which does not comport with the realities of the situation.

## II.

## EXHAUSTION OF REMEDIES IS NOT REQUIRED.

The Court of Appeals has turned the teachings of this Court upside down, holding that Plaintiff is barred from seeking relief from his constitutional deprivations by not having first submitted to the state administrative proceedings. Indeed, this opinion is in direct conflict with an earlier holding by a different panel of the same court in *Austin v. Board of Georgetown Community Unit School District No. 3*, 562 F.2d 446, 453 (7th Cir. 1977), where it was held that even had the Board of Education strictly complied with the state procedural scheme, it would be "totally irrelevant" to the citizen's constitutional rights. See also *Colaizzi v. Walker*, 542 F.2d 969 (7th Cir. 1976), *cert. den.*, 430 U.S. 960, 97 S.Ct. 1710 (1977).

As was said long ago by this Court:

> ". . . It is no answer that the state has a law which if enforced would give relief. The federal remedy [§1983] is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, 365 U.S. 167, 183, 81 S.Ct. 473, 482 (1961).

The opinion of the Court of Appeals in this case is contrary to its own prior holdings, those of this Court and of other Circuits. Other circuits have long held that exhaustion of state remedies is not required if the inadequacy of the state administrative remedy is coextensive with the merits of the plaintiff's constitutional claim. *Jose P. v. Ambach*, 669 F.2d 865, 869 (2d Cir. 1982). Here, Petitioner's claim was indeed coextensive with his attack upon the Board of Education's procedures. To allow the merits of Petitioner's claim to be controlled by the decision upon the procedural aspect is to truly allow the tail to wag the dog. The search for justice and vindi-

cation of constitutional rights cannot become a procedural game where one loses if he selects the "wrong" procedural posture in which to place his case.

The Court of Appeals here made no finding that the verdict of the jury in this case was against the manifest weight of the evidence, or was otherwise improper or inappropriate. The jury's finding that Petitioner's due process rights were violated stands and is binding. Such a finding cannot be evaded by what amounts to playing semantic games with constitutional rights. This Court has unequivocally held in *Patsy v. Board of Regents of the State of Florida, supra*, that one need not exhaust administrative remedies before applying to the federal courts for protection of federal constitutional rights. To rely upon the law of the State of Georgia, as the Court of Appeals has done to avoid this decision, is both inexplicable and impermissible.

To allow this decision to stand will be a retrenchment and narrowing of *Patsy* and again reduce governmental employees' rights. This Court has handed down an unbroken string of decisions seeking to clarify those rights. A decision such as that below will only serve to again confuse the law and breed needless litigation. It cannot stand.

This Court should grant this Petition for Writ of Certiorari to once again affirm what it has in the past—public employees are entitled to due process and those rights will be protected by the federal courts.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Honorable Court to grant its Writ directed to the United States Court of Appeals for the Seventh Circuit, and upon doing so, to reverse the decision of that Court and reinstate the judgment of the United States District Court for the Northern District of Illinois in his favor.

Respectfully submitted,

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# APPENDIX A

**Judgment Of The United States District Court For The Northern District Of Illinois, Eastern Division, May 6, 1980**

BOHUMIL DUSANEK,

*Plaintiff,*

No. 77 C 3985 v.

JOSEPH P. HANNON, RAYMOND C. PRINCIPE, JOHN O'DONNELL, M.D., and BOARD OF EDUCATION OF THE CITY OF CHICAGO,

*Defendants*

Filed Jury verdict for the plaintiff and against defendants Board of Education and Dr. John O'Donnell and assess plaintiff's damages at $100,000.00. Jury further finds for the following defendants and against the plaintiff as to them: Joseph P. Hannon and Raymond Principe. Enter Judgment on Jury verdict consistent with answers to interrogatories. Post trial motions may be filed according to the rule.

/s/ LEIGHTON, J.

# APPENDIX B

## IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 80-1988 & 81-1527

BOHUMIL J. DUSANEK,

*Plaintiff-Appellee,*

*v.*

JOSEPH P. HANNON, RAYMOND C. PRINCIPE, JOHN O'DONNELL, M.D., and THE BOARD OF EDUCATION OF THE CITY OF CHICAGO,

*Defendants-Appellants.*

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-C-3985—George N. Leighton, *Judge.*

ARGUED JANUARY 4, 1982—DECIDED APRIL 26, 1982

Before PELL, *Circuit Judge*, MARKEY, *Chief Judge*,* and SPRECHER, *Circuit Judge.*

PELL, *Circuit Judge.* The appellee brought this action seeking injunctive relief and damages pursuant to 42 U.S.C. § 1983 (1976). The appellee's due process claim is that his employer, the appellant Board of Education of the City of Chicago (the "Board"), and the appellants Joseph P. Hannon, Raymond C. Principe, and Dr. John

* Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

O'Donnell, acting in the scope of their employment with the Board in their positions as Superintendent, Director of Teacher Personnel and Staff Psychiatrist, respectively, deprived him of his property interest in his employment without providing a hearing. On May 6, 1980, the jury rendered a verdict in favor of the appellee against the Board and Dr. O'Donnell only. Subsequently, on the appellee's motion for a permanent injunction seeking to reinstate the appellee in his former teaching position, the district court ordered the parties on June 6, 1980 to proceed pursuant to the Board's rules to obtain the opinion of an independent physician as to the appellee's mental health. Based on the report subsequently submitted to the court, the court denied the appellee's motion for injunctive relief seeking reinstatement in his former position. Both the appellee and the appellants filed post-trial motions for attorney's fees pursuant to 42 U.S.C. § 1988 (1976). The district court granted the appellee's motion for attorney's fees and denied that of the appellants.

In No. 80-1988, the appellants are seeking reversal of the jury verdict and the district court's rulings on the post-trial motions for attorney's fees. Consolidated with that appeal is the appeal from the district court's denial of the appellee's motion for permanent injunctive relief in No. 81-1527. The threshold issue for our resolution is whether the actions of the Board and its employees did, indeed, result in a deprivation of due process under the Fourteenth Amendment.

## I. Factual Background

### A. The Statutory and Administrative Procedure for Teachers' Leaves of Absence for Illness.

According to Principe's testimony and Board Rule 4-44, when a principal has reason to believe that a teacher has a health problem which may impair his or her efficiency, the principal may send a letter to the Department of Personnel requesting that the General Superintendent schedule a health examination for the employee. If the District Superintendent agrees to the request, a form letter is prepared for the

Superintendent's signature. When signed, the letter is then sent to the employee directing him or her to appear for a health examination. If the Board's Medical Director, who is responsible for these health examinations, determines that the employee does not meet the medical standard for teaching, the Director reports the results to the Department of Personnel. The Department then notifies the employee by a form letter of the result of the examination. If the employee failed to meet the medical standard for teaching, the form letter requests the employee to execute an illness leave of absence and to contact the Board's office to arrange another health examination if he or she wishes to obtain reinstatement. The form letter also states:

> Please be advised that if you fail to request an illness leave of absence within ten business days from the date of this letter, it will be recommended that your services be terminated in accordance with State Statute.

The procedure for removal of a tenured teacher for cause is governed by the Illinois School Code, Ill. Rev. Stat. ch. 122, § 34-85 (1975), which provides, *inter alia*, an opportunity for a hearing prior to removal with resort to judicial review.

Board Rule 4-33 governs the duration of teachers' leaves of absence for illness. Any teacher who is granted a leave of more than five school months is required to pass a health examination by a medical examiner selected by the Board's General Superintendent prior to reinstatement. If the teacher fails the health examination, he may request an additional medical opinion as provided by Board Rule 4-19. Rule 4-19 allows the teacher to request an additional medical opinion within ten days from the notice of having failed the Board's examination. If the two medical opinions are in disagreement, a third medical opinion is obtained in the same manner and the majority opinion of the examiners is final.

B. The Appellee's Examination and Leave of Absence.

From September, 1964 to March, 1977, the appellee Dusanek was a tenured teacher at Schurz High School in Chicago. On March 2, 1977, Dusanek complained to the principal, Dr. James Maloney, about a student in his class. Dusanek told Dr. Maloney that a new girl in his class was there to disrupt his class and turn the other students against him. He claimed to know her purpose in his class because she had been involved in this same behavior in one of his classes sometime between 1967 and 1969. At that time, according to Dusanek, she had been accompanied by a heavy-set woman in bib overalls about six feet six inches tall. Dr. Maloney asked Dusanek to put his observations in a memorandum, which Dusanek subsequently did. Dr. Maloney also testified that he noted in the meeting that Dusanek was staring over his shoulder and appeared uneasy and apprehensive.

Dr. Maloney then examined the school records of the student about whom Dusanek had complained, from which he determined that she was born in 1960 and appeared to be about sixteen or seventeen years old. He also talked to two teachers about Dusanek. The information they provided about Dusanek tended to support Dr. Maloney's initial impression of Dusanek's psychological condition. As a result of his investigation, Dr. Maloney wrote the Assistant Superintendent of the Personnel Department requesting that the General Superintendent schedule a health examination for Dusanek.

Thereafter Principe, the Director of the Board's Bureau of Teacher Personnel, received Dr. Maloney's letter requesting an examination of Dusanek. After consulting with Dr. Maloney, he directed his secretary to prepare a form letter dated March 14, 1977, to be signed by Superintendent Hannon, directing Dusanek to report to the Board's offices on March 28, 1977, for an examination. The letter was subsequently signed by the Superintendent and sent to Dusanek.

The appellant, Dr. John O'Donnell, conducts psychiatric examinations for the Board. Prior to Dusanek's

examination, he contacted Dr. Maloney who informed him of his conversation with Dusanek and the results of his investigation. On March 28, 1977, Dr. O'Donnell examined Dusanek and concluded that Dusanek was not in satisfactory psychological condition to continue his teaching duties. Dusanek was informed of his failure to meet the medical standard for teaching in a form letter dated March 29, 1977. It was this form letter which directed Dusanek to execute the enclosed request for a leave of absence for illness within ten days from the date of the letter, or it would be recommended that his services be terminated in accordance with the procedures of the state statute governing removal of tenured teachers. On April 5, 1977, Dusanek executed the request for a leave of absence due to illness. Dating from March 29, 1977, Dusanek was placed on a leave of absence.

At Dusanek's request, Dr. O'Donnell gave him a second examination in July, 1977. Dr. O'Donnell found that Dusanek was not in condition to return to his position, and concluded that Dusanek should continue in therapy with his own psychiatrist who had been treating Dusanek for several years. In a letter dated August 19, 1977, Dusanek was again informed that he did not meet the medical standard for teaching. The letter also requested that Dusanek execute the enclosed request for a leave of absence, which Dusanek did. On October 27, 1977, Dusanek filed this suit claiming the Board and its employees had deprived him of a property interest in his employment without due process.

C. The Report of Dr. John Hanni Pursuant to the District Court's Order.

Prior to ruling on the appellee's post-trial motion for injunctive relief seeking reinstatement, the district court ordered the parties to proceed pursuant to Board Rules 4-33 and 4-19 to obtain an independent medical opinion as to Dusanek's ability to return to his position. Dr. John W. Hanni submitted his report on Dusanek to the court on March 13, 1981. He concluded that Dusanek suffered

from a "paranoid schizophrenic disorder which is chronci, with marked impairment of social functioning." He also concluded that Dusanek's mental condition at the time of Dr. Hanni's examination had existed since at least March of 1977, but was "obviously of longer duration." Based on Dr. Hanni's report, the district court denied Dusanek's motion for injunctive relief seeking reinstatement.

II. Dusanek's Claim of Denial of Due Process.

Dusanek's position as a tenured teacher was sufficient to create an entitlement to a property interest under the law of Illinois. Having created such an entitlement, the state could not deprive Dusanek of his position without first affording him due process. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sinderman*, 408 U.S. 593 (1972).

There is no question that the Board and its employees complied with the Board's rules and the state statutes in their procedural treatment of Dusanek. We do not find this statutory and administrative procedure to be somehow arbitrary or unreasonable.

There is nothing unconstitutional about a state establishing a tenure system in which the state retains the prerogative to discontinue the teaching duties of teachers who are not physically or mentally competent to continue teaching. In any such system, some school official must be lodged with the preliminary authority to request a medical investigatory procedure. The Illinois procedure whereby certain school authorities can require teachers who may have medical difficulties to submit to medical examinations obviously serves strong state interests. Only disabilities which impair the efficiency of a teacher may be the basis for requiring a health examination, and a health examination must be conducted before a teacher is asked to request a leave of absence. When the result of that medical examination is adverse to a teacher, the Illinois procedure permits the teacher either to request a medical leave of absence, or to fight his or her removal by refusing to take such a

leave, thereby triggering rights to a hearing. The teacher is given the option of a hearing before any property interest is taken away. Certainly the facts in the record support Dr. O'Donnell's conclusions and the principal's original decision to commence the process that resulted in Dusanek's medical examination. We are of the opinion that these procedures are all that Illinois need reasonably provide to assure a fair and reasonable determination satisfying due process.

Dusanek contends that the March 29 letter compelled him to take a leave of absence. The availability of recourse to a constitutionally sufficient administrative procedure satisfies due process requirements if the complainant merely declines or fails to take advantage of the administrative procedure. *See, e.g., Palma v. Powers*, 295 F. Supp. 924, 940 (N.D. Ill. 1969); *Marlowe v. Village of Wauconda*, 91 Ill. App. 3d 874, 883 (1981); *Rawlings v. Illinois Department of Law Enforcement*, 73 Ill. App. 3d 267, 275 (1979); *cf. Brooks v. Board of Trustees of the University of Illinois*, 90 Ill. App. 3d 591, 592 (1980). These decisions do not amount to a requirement of exhaustion of administrative remedies as a predicate to a section 1983 claim. Rather, they express the logical proposition that a state cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff has simply refused to avail himself of them. Because the procedural protections existed, the state cannot be accused of withholding them in a section 1983 suit. *Cf. Parratt v. Taylor*, 451 U.S. 527 (1981).

We conclude that it is not a deprivation of due process of law to be put to the option of defending oneself in a proper dismissal hearing or voluntarily accepting a change in one's job status, when the state's action in first initiating the medical investigation is reasonable and in full compliance with the conditions of the teacher's tenure. Significantly, the letter states only that dismissal proceedings would be *recommended* if Dusanek failed to request a leave of absence. The appellant has suggested that continued performance of his duties in the face of the letter's directive would have been grounds for removal for cause, the cause being insubordination. This

assertion is unsupported by the record. Moreover, we see nothing in the Board's rules or the state statute which would have precluded Dusanek from demonstrating his competency in a removal hearing.

This question of coercion by the state resulting in a deprivation of procedural rights may best be analogized to those cases in which a government employee seeks procedural review of his or her resignation as a "discharge" coerced by the actions of the federal government. As stated in *Paroczay v. Hodges*, 219 F. Supp. 89, 90 (D.D.C. 1963), "[i]f the resignation was involuntarily given . . . then plaintiff's separation from government employment constituted a discharge, and he would be entitled to certain procedural rights . . . ." These cases indicate that a resignation resulting from a choice between resigning or facing proceedings for dismissal is not tantamount to discharge by coercion without procedural review if the employee is given sufficient time and opportunity for deliberation of the choice posed. *See, e.g., Dabney v. Freeman*, 358 F.2d 533 (D.C. Cir. 1959); *Competello v. Jones*, 267 F.2d 689 (D.C. Cir. 1959); *Paroczay v. Hodges*, 219 F. Supp. 89 (D.D.C. 1963); *see also Molinar v. Western Electric Co.*, 525 F.2d 521 (1st Cir. 1975), *cert. denied*, 424 U.S. 748 (1976) (applying New York law); *Johnson v. General Motors Corp.*, 144 Ga. App. 305, 241 S.E.2d 30 (1977) (applying Georgia law), *cert. denied*, 437 U.S 905 (1978); *Wilkinson v. Trust Co. of Georgia Association*, 128 Ga. App. 473, 197 S.E.2d 146 (1973) (applying Georgia law).

III. Conclusion.

For these reasons, we conclude that there was no denial of due process by the state and, accordingly, reverse the judgment in No. 80-1988 and the district court's award of attorney's fees to the appellee. We affirm the district court's denial of the appellee's post-trial motion for permanent injunctive relief seeking reinstatement in No. 81-1527. We affirm the district court's denial of attorney's fees to the appellant as the district court did not abuse its discretion in concluding that the

action was not frivolous, unreasonable, or without foundation. *Reichenberger v. Pritchard*, 660 F.2d 280, 288 (7th Cir. 1981).

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

# APPENDIX C

**Order Of The United States Court Of Appeals For The Seventh Circuit, June 28, 1982**

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

BOHUMIL J. DUSANEK,

*Plaintiff-Appellee,*

No. 81-1527 vs.

JOSEPH P. HANNON, RAYMOND C. PRINCIPE, JOHN O'DONNELL, M.D., and BOARD OF EDUCATION OF THE CITY OF CHICAGO,

*Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 C 3985—George N. Leighton, *Judge.*

On consideration of the petition for rehearing filed in the above-entitled cause by petitioner-appellee, Bohumil J. Dusanek, the judges of the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

# APPENDIX D

## Statutes And Rules Involved

**Chapter 122, Illinois Revised Statutes §34-85 (1961):**

**§ 34-85. Removal for cause—Notice and hearing—Suspension**

No teacher or principal appointed by the board of education shall (after serving the probationary period of 3 years specified in Section 34-84 be removed except for cause, and then only by a vote of a majority of all members of the board, upon written charges presented by the general superintendent of schools, to be heard by the board or a duly authorized committee thereof, after 30 days' notice, with a copy of the charges, is served upon the person against whom they are preferred, who shall have the privilege of being present, together with counsel, offering evidence and making defense thereto. At the request of any party the hearing shall be public. The action and decision of the board in the matter shall be final. Pending the hearing of the charges, the person charged may be suspended as by the rules of the board may be prescribed but such person, if acquitted, shall not suffer any loss of salary by reason of the suspension.

**Chapter 122, Illinois Revised Statutes §10-22.4 (1975)**

**10-22.4 Dismissal of teachers**

§ 10-22.4. Dismissal of teachers. To dismiss a teacher for incompetency, cruelty, negligence, immorality or other sufficient cause and to dismiss any teacher, whenever, in its opinion, he is not qualified to teach, or whenever, in its opinion, the interests of the schools require it, subject, however, to the provisions of Sections 24-10 to 24-15, inclusive. Temporary mental or physical incapacity to perform teaching duties, as found by a medical examination, is not a cause for dismissal. Marriage is not a cause for removal.

**Rules Of The Board Of Education**

**Sec. 4-19. Health Examination—Candidate for Certificate.** All candidates for certificates, in addition to the academic examination, shall be required to pass a health examination by a medical examiner selected by the General Superintendent of Schools, unless such person is a regularly assigned teacher in the Chicago Public Schools, or has, within a period of one year immediately preceding, successfully passed such health examination in connection with the award of another certificate.

In the event that the candidate does not pass such health examination and within ten days from the notice of such failure, makes written request to the General Superintendent of Schools for additional medical opinion, the General Superintendent of Schools shall select another medical examiner acceptable to both the candidate's personal physician and to the General Superintendent of Schools. If the medical opinions are in disagreement, a third medical examiner shall be selected in the same manner, and a majority opinion of such health examiners shall be final.

**Sec. 4-41. Absence Without Leave—Members of Teaching Force.** Absence of members of the teaching force, after the expiration of a period of two weeks without written leave of absence or failure to return at the expiration of any leave of absence previously granted, shall, after due notice as hereinafter provided, be deemed and declared to constitute an abandonment of employment by such absentee and an automatic severance of all connections with the Chicago Public School System; provided, however, that before such severance and termination of employment shall become effective under this section a notice in writing shall be sent by registered mail to the absentee member of the teaching force, addressed to the last recorded or last known place of residence, and stating in substance that a failure to report for duty within twenty days from the date of such notice, or to apply for leave of absence if eligible therefor, will be deemed an abandonment of employment and will constitute a surrender of all rights of tenure which might be claimed by

virtue of the former service of such absentee member of the teaching force.

**Sec. 4-33. Leave for Illness—Members of Teaching Force.** In case of absence exceeding 10 consecutive school days due to personal illness, a full time regularly assigned teacher or principal must apply for and secure a leave of absence pursuant to the provisions of this section. The General Superintendent of Schools shall have authority, subject to the approval of the Board of Education, to grant a leave of absence (without pay except as provided in the "sick pay" rule) to a teacher or principal who shall file a written request therefor, in which case the position shall be held open. Except as hereinafter provided, such leave shall not exceed 5 school months in any school year nor be in excess of a total of 5 school months in any 2 consecutive school years. Upon presentation of proof establishing continued serious personal illness longer than said 5 school months, rendering return to duty impossible, the General Superintendent of Schools, subject to the approval of the Board of Education, may extend a leave of absence granted for personal illness for such additional period not to exceed 25 school months, as in his judgment is warranted by all the circumstances, including the service record of the teacher or principal. In case of an extension for a period of more than five school months, the position shall be declared vacant, but the teacher or principal, upon reporting for duty at the expiration of such extended leave, shall be eligible for immediate assignment to a vacant position equal in rank and be placed at the top of the transfer list to return to his former school if he so desires. Any teacher or principal who is granted an extension of leave for more than five school months as herein provided for, shall be required to pass a satisfactory health examination by a medical examiner selected by the General Superintendent of Schools before return to duty. If he does not pass such examination, he may request additional medical opinion, on the terms and in the manner provided in Sec. 4-19 of these rules.

When a leave has been granted under this section the absence shall not be construed as a break in service of such person on leave so far as seniority of service is concerned. During the period the teacher or principal is entitled to such pay under the rules, the absence shall not be construed as a break in service for any purpose.

In case of absence exceeding 10 consecutive school days due to personal illness, a Full Time Basis (FTB) temporarily certified teacher may apply for and secure a leave of absence without pay, except as provided in the sick pay rule. Such leave shall not exceed 5 school months unless extended, provided however that all leaves granted such temporarily certified teachers shall expire at the end of June with the close of the school term with the expiration of their temporarily teaching certificates.

In the event that a Full Time Basis (FTB) temporarily certified teacher receives another certificate, temporary or regular, through the Board of Examiners for the ensuing school year, he will be eligible to apply for and secure another leave of absence upon presentation of proof of establishing continued serious personal illness. Said extension will be limited to 5 school months and the teacher must pass a health examination by a medical examiner of the Board before returning to teaching.

The replacement of a Full Time Basis (FTB) temporarily certified teacher by a regularly certified teacher or by another temporarily certified teacher in the position he occupied shall not affect the leave as far as eligibility for sick pay is concerned. (Amended 8-23-67)

No. 82-948

Office-Supreme Court, U.S.
FILED
OCT 26 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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BOHUMIL J. DUSANEK,

*Petitioner,*

*vs.*

JOHN O'DONNELL, M.D., and the BOARD OF EDUCATION OF THE CITY OF CHICAGO,

*Respondents.*

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## RESPONDENTS' REPLY TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Docket No. 80-1986

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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BOHUMIL J. DUSANEK,

*Petitioner,*

*vs.*

JOHN O'DONNELL, M.D., and the BOARD OF EDUCATION OF THE CITY OF CHICAGO,

*Respondents.*

---

## RESPONDENTS' REPLY TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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**Docket No. 80-1988**

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## STATEMENT OF FACTS

The statement of facts submitted by the plaintiff-petitioner is argumentative, includes matters not in the record,[1] omits

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[1] For example, Board Rule 4-41 Absence Without Leave —Members of the Teaching Force (cited at page 9 and appendix page 13a of petitioner's brief) is raised for the first time in this case. This is an example, unfortunately repeated throughout petitioner's brief, of not only raising new matters but also citing statutes and rules which are totally inapplicable. During the period covered by this lawsuit, Mr. Dusanek was on sick leave and therefore could not have been "absent without leave."

matters which are in the record and is generally a biased presentation of the evidentiary material contained in the record. Accordingly, defendants-respondents submit the following summary.

Bohumil J. Dusanek is a tenured school teacher employed by the Board of Education of the City of Chicago. He can only be removed for cause and then only after a full evidentiary hearing, and judicial review of any agency adverse decision may then be had, Ill. Rev. Stat. ch. 122 § 34-85 (1975).

Under Illinois Statute, Ill. Rev. Stat. ch. 122 § 24-5 (1975), the school board may from time to time require a health examination of its employees to be performed by a licensed physician and shall pay the expenses thereof from school funds. Complementing this is Board Rule 4-44 which provides that the General Superintendent of Schools may require the teacher to submit to a health examination when it appears that the teacher has a health problem which may impair his efficiency.

On March 2, 1977, Mr. Dusanek complained to his high school principal, Dr. James Maloney, that a new girl in his class was there to cause disruption. He knew this because she was in his class approximately 10 years earlier and associated with a heavy set 6'6" woman in bib-overalls. No one had ever seen this woman because she always disappeared when Mr. Dusanek went to the office to complain. Dr. Maloney noted that during this conversation Mr. Dusanek was uneasy and apprehensive.

Dr. Maloney verified that the student complained of was only 16 or 17 years old and he interviewed two teachers who related bizzare experiences with Mr. Dusanek. These matters verified Dr. Maloney's initial impression that Mr. Dusanek seemed to be experiencing some psychological impairment. After receiving his District Superintendent's approval, he requested that the General Superintendent direct Mr. Dusanek to report for a Rule 4-44 health examination. After personal

consultation between Dr. Maloney and Teacher Personnel Director Raymond Principe, the General Superintendent did so.

Insofar as is pertinent to this action, Dr. John O'Donnell, Staff Psychiatrist, examined Mr. Dusanek on March 28, 1977 and in July, 1977. During the examinations, Dr. O'Donnell recognized the classic symptoms of mental illness (paranoid personality) and determined that this interfered with Mr. Dusanek's efficiency as a teacher, particularly that he was exhibiting unreasonable hostilities towards one of his students and could become violent. At the conclusion of the first examination in March, Dr. O'Donnell discussed the teacher's specific problems but did not tell the teacher that he had a paranoid personality. Dr. O'Donnell also requested releases to obtain medical records; Mr. Dusanek signed the release for his orthopedic surgeon's records but he refused to sign the release for his psychiatrist's records. The July examination proceeded in a similar manner, except that this time Mr. Dusanek did sign the release for the psychiatrist's records.

Dr. O'Donnell informed the personnel department that Mr. Dusanek had failed the health examination, and Mr. Principe wrote to Mr. Dusanek. This letter informed the teacher of the results, suggested that he take an illness leave of absence in order to protect his teacher tenure and job benefits, and concluded:

> Please be advised that if you fail to request a leave of absence within ten business days from the date of this letter, it will be recommended that your services be terminated in accordance with State Statute.

Upon receipt of this letter, Mr. Dusanek consulted with his attorneys and thereafter executed the leave of absence request. Mr. Dusanek testified that he executed this form in order to protect his job.

Mr. Dusanek wrote to Dr. Abrams (the Board's medical director, who had just retired) and asked why he failed the

examination; however he received no reply. Mr. Dusanek then wrote to Mr. Principe, incorporating the content of the Abrams letter and asking for another health examination. Mr. Principe responded by scheduling the July examination, which Mr. Dusanek also failed.

Mr. Dusanek has been under treatment since 1973 by a private psychiatrist, Dr. Garth W. Smith, for paranoid personality with conversion features (unreasonable hostility reactions to stress, internal pain, or distress; unreasonable belief of being abused or misused by other persons; together with physical complaints having no organic basis but resulting from mental problems). At Mr. Dusanek's request, Dr. Smith wrote a short "To whom it may concern" letter, which Dr. O'Donnell found to contain insufficient medical history to permit an evaluation. After Mr. Dusanek executed a release, Dr. Smith provided a more comprehensive medical history and treatment. He advised of his patient's illness (which confirmed Dr. O'Donnell's diagnosis), the nature of the therapeutic treatment and his opinion that it was not a cooperative venture. He also stated Mr. Dusanek had withdrawn group health insurance claim forms because they would reveal to his employer that he was "paranoid." Although Mr. Dusanek's condition was essentially stable, he noted a deterioration in the teacher's mental state in May, 1977. Dr. Smith testified that he lacked sufficient information of Mr. Dusanek's work environment and therefore could not give a professional opinion as to any effect Mr. Dusanek's state of health would have on his job performance.

Pursuant to the order of District Judge George N. Leighton directing the parties to use Board Rules 4-33[2] and 4-19, the

[2] Perhaps in error, petitioner refers to Article 33 of the union contract rather than Board Rule 4-33 (petitioner's brief, page 8). Article 33 does concern sick leaves, but its sick leave provisions apply only to non-tenured teachers, *i.e.*, "a full time-basis (FTB) temporarily certified teacher." Other sections of this article pertain to leaves

*(Footnote continued on following page)*

plaintiff retained Dr. John W. Hanni as an independent psychiatrist to examine Mr. Dusanek. He reported that he found the patient's present mental condition characterized by the existence of bizzare delusions of a persecutory nature, illogical thinking, inappropriate affect, a loosening of mental associations, a tendency to be argumentative, at times violent, doubts as to gender identity, denial of neurological illness, and rationalization of his medicines as being for diet control. This condition has been present since well prior to March, 1977. Mr. Dusanek suffers from a paranoid schizophrenic condition which is chronic. He is suspicious, hostile, unreasonably angry and feels he may have to resort to violence. Since Mr. Dusanek continues under private care and has structured his existence around the relative protection of his household, his condition has stabilized.

A Grievance Procedure is part of the contract between the Board of Education and Mr. Dusanek's union. Mr. Michael Wrenn, Director of Employee Relations, testified as to the procedure. A grievance, in a work situation, is a violation, misinterpretation or misapplication of a Board Rule or of the terms of the union agreement. A claim that Board Rule 4-44 (Health Examination) had been violated, misinterpreted or misapplied would be grievable. The teacher presents a written complaint and meets with his principal and union delegate. The principal then render a written decision. The agency review process involve the following further protections: (1) hearing before the district superintendent; (2) hearing before Mr. Wrenn; (3) hearing before a three-member board committee; (4) vote by the full board in session; (5) binding

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*(Footnote continued from preceding page)*

for death of a close relative; leaves to attend conferences, workshops, conventions and meetings; maternity and paternity leaves; travel or study leaves; personal business leaves; and regulation of accumulated leave days. None of this is pertinent to Mr. Dusanek's claim that he was deprived of his property interest in his employment without due process of law.

arbitration at the union's request before the American Arbitration Association. All hearings are *de novo*, the teacher may present evidence and witnesses, and he receives a written report of the findings.

By Statement of Uncontested facts, the parties agree that Mr. Dusanek never utilized the Grievance Procedure to resolve his complaint that Board Rule 4-44 was violated, misinterpreted or misapplied to him. His counsel advised the district judge that they elected to file this lawsuit instead.

The following stipulations were submitted to the jury at the close of testimony:

| | |
|---|---|
| $69,292.43 | Projected gross earnings had the plaintiff not been on a leave of absence. |
| $ 2,304.94 | Actual earnings from other sources during this period. |
| $ 1,290.72 | Moneys actually paid to the plaintiff by the Board of Education as holiday pay during this period. |
| $10,648.44 | Moneys actually paid to the plaintiff by the Board of Education as sick leave pay during this period. |

Pursuant to Board Rule 4-33 (petitioner's appendix, pp. 14a-15a) an illness leave of absence shall not be construed as a break in service for any purpose; therefore, employee benefits are preserved (such as, seniority, pension, health and dental insurance, deferred tax annuity programs, holiday pay, etc.)

Following trial, the jury rendered a verdict for money damages against the Board of Education and Dr. O'Donnell and found in favor of defendants Hannon and Principe. The district court subsequently denied plaintiff's prayer for a permanent injunction seeking to reinstate the teacher in his position. Pursuant to 42 U. S. C. § 1988, the district court awarded attorney's fees to Mr. Dusanek and denied attorney's fees to Dr. Hannon and Mr. Principe. On appeals, the Seventh Circuit reversed the jury's verdict, vacated the award of attorney's fees to the plaintiff, and affirmed the denial of injunctive relief to the plaintiff and the denial of attorney's fees to the defendants. It also awarded the defendants-appellants the customary costs of appeal in both appeals.

## ARGUMENT

### I.

### THE PETITION FOR A WRIT OF CERTIORARI IS UNTIMELY

The maximum allowable time for petitioning for a Writ of Certiorari under 28 U. S. C. 2201(c) is 90 days, and plaintiff-petitioner has failed to meet this requirement.

Decided below were not one but two appeals from the decisions of the U. S. District Court, docketed respectively as 80-1988 and 81-1527. As described by the opinion of the Seventh Circuit, these appeals were (petitioner's appendix, p. 3a):

> . . . On May 6, 1980, the jury rendered a verdict in favor of the appellee and against the Board and Dr. O'Donnell only. Subsequently, on the appellee's motion for a permanent injunction . . . the court denied the appellee's motion . . .
>
> In No. 80-1988, the appellants are seeking a reversal of the jury verdict and the district court's rulings on the post-trial motions for attorney's fees. Consolidated with that appeal is the appeal from the district court's denial of the appellee's motion for permanent injunctive relief in No. 81-1527.

On April 26, 1982, the Court of Appeals rendered its decision. Thereafter, Dusanek filed a timely petition for a rehearing in 81-1527, but he did not do so in 80-1988. The mandate in 80-1988 issued on May 17, 1988 thereby severing the appeals. Following the denial of Dusanek's petition for a rehearing (petitioner's appendix, p. 11a), the mandate in 81-1527 was issued on July 7, 1982. (see respondents' appendix).

If plaintiff were petitioning for a writ in 81-1527, this petition would be timely. However, he is not. The entire thrust of his petition is to ask this court "to reinstate the judgment of

the United States District Court in his favor."[3] Of the four initial defendants therein, plaintiff petitions against only the Board of Education and O'Donnell as respondents, the losing defendants in 80-1988. That judgment was entered in only the portion of the appeal docketed as 80-1988.

Appeal 81-1527 deals only with the denial of injunctive relief (petitioner's appendix, p. 3a), and plaintiff-petitioner does not ask for any relief from the determination in that appeal. In fact, although the plaintiff received an adverse decision therein, he never appealed from the trial court's ruling. 81-1527 was actually presented to the Circuit Court of Appeals by all four defendants in order that the entire record would be available to the court for its consideration.[4]

The Petition for a Writ of Certiorari to the Seventh Circuit in docket number 80-1988 has been filed 153 days after that court decided the appeal; the plaintiff filed no intervening petition for rehearing therein. Plaintiff-petitioner is trying to "tail-end" his 80-1988 petition to the other appeal docket; this he cannot do. This petition is well beyond the 90 day permissable period and should be refused.

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[3] This is printed at petitioner's appendix, p. 1a, and is the court's entry of judgment on the jury's verdict. The only other favorable judgment received by the plaintiff was the court's award of attorney's fees, 42 U. S. C. § 1988.

[4] For example, upon oral testimony both the plaintiff's psychiatrist (Dr. Smith) and the defendant, Dr. O'Donnell, testified as to the plaintiff's paranoid condition; only Dr. O'Donnell testified to the impact on job performance. The report of Dr. Hanni, an independent psychiatrist retained after the discharge of the jury, confirmed Dr. O'Donnell's findings of Mr. Dusanek's inability to function as a teacher. However, his report was contained in 81-1527.

## II.

## THE PETITION PRESENTS NO ISSUE OF IMPORTANCE WHICH THIS COURT IS REQUIRED TO RESOLVE

Having undertaken, with the advice of counsel, an avoidance of all agency remedies and an election to file a civil rights court action instead to claim that those remedies were denied to him, Mr. Dusanek now wishes to defend and justify those strategic mistakes by claiming that exhaustion of administrative remedies is not required, and that his action should not be barred by his failure to use available state remedies.[5] It is clear from the record that the plaintiff deliberately spurned the same agency due process which he claims was denied to him.

In the beginning, plaintiff avoided due process by selecting a procedure that was non-adversarial in nature, the leave of absence. Plaintiff did so with the advice of counsel and he testified that this choice was intended to protect his employment. If he really believed, as he claimed in this action, that either alternative produced a property deprivation, then he could have had his due process hearing by refusing the leave of absence and invoking the proceedings required by state statute.

Next, he declined to initiate a grievance to test his claim that the Rules of the Board of Education did not permit an involuntary leave of absence. While somewhat less formal than state statute, this procedure is no less adequate. The plaintiff does not question this procedure, he only says that he decided to file the lawsuit instead.

Finally, he never asked for the independent medical evaluations which presumably would have vindicated his claim

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[5] The argument thus begins with a fallacy. Even where the exhaustion rule would apply, relief in federal court is not barred, only postponed. See, *e.g.*, the numerous actions initiated *de novo* in the federal courts after agency action under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

that he "was suffering from no physical or mental disability, which would interfere with the performance of his duties as a teacher." (complaint, Count I, par. 21). Yet, though his treatment under his personal psychiatrist for the previous four years was not a cooperative venture, he did have some insight into his illness and treatment. No doubt he feared the ultimate finding by the independent psychiatrist of significant job impairment.

It cannot be a violation of due process rights to offer a tenured teacher the alternative to a procedure which could lead to his termination for cause.[6] This not only serves the best interests of the teacher, but also of the state. As Judge Pell held herein (petitioner's appendix, p. 7a):

> The Illinois procedure whereby certain school authorities can require teachers who may have medical difficulties to submit to medical examinations obviously serves strong state interests.

In *Tetmeier* v. *Board of Education of School District 149*, 5 Ill. App. 3d 982, 284 N. E. 2d 380, 382 (1972), the state court presented a more detailed rational of the same view:

> In the school setting mental well-being of teachers can be even more important than physical well-being. We do not believe that the legislature failed to perceive this when the

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[6] At page 10 of Petitioner's brief, he cites to Ill. Rev. Stat. ch. 122 ch. § 10-22.4 which was amended in 1975 to provide, "Temporary mental or physical incapacity to perform teaching duties, as found by a medical examination, is not a cause for dismissal." This is a limitation on the powers of a board of school directors of a school district having a population of less than 1000 inhabitants and not governed by any other section of the act. The Board of Education of the City of Chicago is a school district with a population of greater than 500,000 and is governed primarily by section 34 of the School Code. Thus, the section cited by plaintiff has very limited application in the State of Illinois and has no application to a school district with a population in excess of 500,000.

> statute [Ill. Rev. Stat. ch. 122 § 24-5] was enacted. Any other construction would leave a school board with no recourse against a teacher who displayed tendencies toward mental instability, and there is no reason to wait until behavior becomes so aberrational as to itself be grounds for dismissal for cause before any action is taken.

In Mr. Dusanek's case, both the Board of Education's Medical Department and Personnel Department, after investigation and health examination perceived that the teacher was experiencing mental instabilities which interfered with his efficiency as a teacher. The Board of Education recommended that he take an illness leave of absence, whereby he would have an opportunity to restore his health and teaching efficiency. It is a fact that the Board of Education did offer to forbear of its right to file charges; that Mr. Dusanek did take his leave of absence; and that the Board of Education did forbear, to the benefit of the teacher.

In general, a party's procedural due process rights are not violated when he knowingly and voluntarily elects one of two or more mutually exclusive remedies, *Reynolds* v. *United States*, 454 F. 2d 1368, 1377 (Ct. Cl., 1972). For example, in *Competello* v. *Jones*, 267 F. 2d 689 (D. C. Cir., 1959), the plaintiff asked for relief when she resigned after agency officials advised her that they intended to file charges for separation from the service. The court held that in view of the plaintiff's election, the agency action was not reviewable.

*Dusanek* v. *Hannon* is not an exhaustion of remedies action. It represents a deliberate avoidance of state remedies. At no time did plaintiff claim that these particular remedies were inadequate. In the final analysis, plaintiff has failed to avail himself of his procedural opportunities and, having failed to pursue this hearing and review avenue, he is not now in a position to deny their availability to him. "Due process was not denied—it was waived." *Brooks* v. *Board of Regents of the*

*University of Illinois*, 90 Ill. App. 3d 591, 592, 413 N. E. 2d 513 (1980). As stated by Judge Pell in his *Dusanek* opinion, after appropriate citations (petitioner's appendix, p. 8a):

> These decisions do not amount to a requirement of exhaustion of remedies as a predicate to a section 1983 claim. Rather, they express the logical proposition that a state cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff has simply refused to avail himself of them. Because the procedural protections existed, the state cannot be accused of withholding them in a section 1983 suit.

The present action bears a distinct similarity to this Court's 1981 opinion in *Parratt* v. *Taylor*, 451 U. S. 527, 542, 68 L. Ed. 2d, at 433. In that action, a state prisoner purposefully avoided state due process remedies and instead filed a section 1983 action. Citing with approval Justice Stevens' opinion (as a Circuit Judge) in *Bonner* v. *Coughlin*, 517 F. 2d 1311, 1319 (7th Cir., 1975), the Court quoted:

> We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process within the meaning of the Fourteenth Amendment.

Plaintiff presents two interrelated arguments: first, that no agency remedies were available to him; second, that he need not use those available remedies. But the latter contradicts the former. Remedies were available to Mr. Dusanek, and had he and his counsel used them, he would have received all the process due him. Instead, he and his counsel avoided them. This is the entire basis of the lawsuit. Due process was not denied, it was waived. This Court has already once reached this conclusion, and accordingly it no longer becomes an issue to review again only one year later.

Plaintiff's claim is not that the Circuit Court of Appeals decision erred in holding that the state did not deprive him of due process, but rather that the Court deprived him of a substantial money judgment by its decision.

## III.

## OTHER ISSUES RAISED BY PETITIONER

Addressing briefly other arguments raised by the plaintiff-petitioner:

Mr. Dusanek is unquestionably mentally ill to the point that it affects his performance as a teacher. He was aware of this for at least four years prior to his examination by the Board of Education physician. His own physician confirms the illness; the independent physician does so in even stronger terms. Of what merit can it be to argue that Dr. O'Donnell's procedures were careless, that his input was inadequate, that his consultation with the teacher was insufficient, while carefully avoiding the obvious fact that Dr. O'Donnell's diagnosis of paranoia was a correct one, sustained by all other examining physicians.

It is an evidentiary fact that Mr. Dusanek testified both a) that he knew approximately two weeks prior to his examination that part of it would be psychiatric, and b) he never knew of the psychiatric examination until he met the examining physician. His counsel prefers the version which best suits his argument. However, this is a factual issue, not a legal issue.

Dr. O'Donnell's role is as a medical factfinder and not as a decision-maker. Nonetheless, the psychiatrist *did* discuss with Mr. Dusanek following the examination, the teacher's particular problems and recommended continued counseling by Dr. Smith. Mr. Dusanek was well aware from this discussion and his prior treatment why he failed the health examination. He also tried twice to withhold this information from his employer.

first, by withdrawing a health insurance claim for treatment by Dr. Smith; second, by initially refusing to authorize the release of his records from Dr. Smith. The picture of an uninformed employee has no validity.

The Board of Education did not coerce a leave of absence from Mr. Dusanek. The letter to him by Mr. Principe states only that charges would be *recommended*. It is by no means certain that if Mr. Principe so recommended, that the General Superintendent would file those charges, or that the Board would adopt them, or that a hearing would sustain them, or that the courts would affirm them. Mr. Dusanek counseled with his attorneys; thereafter he selected the leave of absence for the purpose of protecting his employment. The lower court found, on the facts, that this selection by Mr. Dusanek was not coerced. Other than the plaintiff's self-serving conclusion, there is no evidence to the contrary.

It is doubtful that the jury found that there was no reason for plaintiff to take a leave of absence—in addition to the evidence, they saw before them a man who was confused, angry, rambling and at times incoherent, moods which can be readily discerned from his answers recorded in the trial transcripts. But the jury reaches its verdict on the law as it is presented in the instructions. In this instance, the district judge approved a plaintiff's instruction (no. 24) which deprived defendants of the significant and viable defense that plaintiff had waived his claim of denial of due process by refusing to use available due process.

## CONCLUSION

For the foregoing reasons, defendants pray that this Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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WILLIAM J. QUINLAN,
*Assistant Attorney*
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*Attorneys for Respondents*

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

219 South Dearborn Street

Chicago, Illinois 60604

Thomas F. Strubbe
Clerk
312-435-5850

May 17, 1982

Mr. H. Stuart Cunningham
Clerk, U.S. District Court
219 South Dearborn Street
Chicago, Illinois 60604

Re: BOHUMIL J. DUSANEK, Plaintiff-Appellee,
vs.
JOHN P. O'DONNELL and BOARD OF EDUCATION OF THE CITY OF CHICAGO, a body politic and corporate, Defendants-Appellants.
U.S.C.A.-7 No. 80-1988
District Court No. 77-C-3985

Dear Clerk:

Herewith is the mandate of this Court in the above-entitled appeal. "A certified copy of the judgment and a copy of the opinion of the Court, if any, and any direction as to costs shall constitute the mandate." (F.R.A.P.41(a)). I am also returning the original record of your District Court, which was transmitted to this office for use on appeal.

Please acknowledge receipt on the enclosed copy of this letter.

Contents of Record:
Record being used on
other appeal. (No. 81-1527)

Sincerely yours,
THOMAS F. STRUBBE, Clerk

By: /s/ Lupe Calderon,
Lupe Calderon,
*Deputy Clerk*

Date:

Received above mandate and record from the clerk of the United States Court of Appeals for the Seventh Circuit.

_____
Clerk of District Court

Copies mailed to:
Michael J. Murray, 228 N. LaSalle, Rm 312, Chgo, IL 60601
Thomas P. Brown, 100 W. Monroe, Chgo, IL 60603
Wayne B. Giampietro, 134 N. LaSalle, Chgo, IL 60602

Note to Counsel:

If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

219 South Dearborn Street

Chicago, Illinois 60604

Thomas F. Strubbe
Clerk
312-435-5850

July 7, 1982

Mr. H. Stuart Cunningham
United States District Court
219 S. Dearborn
Chicago, IL 60604

Re: BOHUMIL J. DUSANEK, Plaintiff-Appellee,
vs.
JOSEPH P. HANNON, et al., Defendants-Appellants
U.S.C.A.-7 No. 81-1527
District Court No. 77 C 3985

Dear Clerk:

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Please acknowledge receipt on the enclosed copy of this letter.

Contents of Record:
one vol pldgs
3 vol trans
3 vol depositions
Medical report of plaintiff
(in brown envelope)

Sincerely yours,
THOMAS F. STRUBBE, Clerk

By: /s/ Dolores Rosellini
Dolores Rosellini
*Deputy Clerk*

Date:

Received above mandate and record from the Clerk of the United States Court of Appeals for the Seventh Circuit.

_____
Clerk of District Court

Copies mailed to:
Michael J. Murray, Law Dept Bd. of Education of the City of Chicago 228 N. LaSalle Street, Chicago, Ill 60601
Thomas P. Brown, Suite 1710, 100 W. Monroe Chicago IL 60603
Wayne B. Giampietro DeJong, Poltrock & Giampietro 134 N. LaSalle Chicago, IL 60602

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IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 81-1527

BOHUMIL DUSANEK,
*Plaintiff-Appellee,*

*vs.*

JOSEPH P. HANNON, RAYMOND C. PRINCIPE, JOHN O'DONNELL, M.D., and the BOARD OF EDUCATION OF THE CITY OF CHICAGO,
*Defendants-Appellants.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable
GEORGE N. LEIGHTON,
Judge Presiding.

## PETITION FOR REHEARING

TO THE JUSTICES OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT:

Plaintiff-Appellee Bohumil Dusanek respectfully requests the Court to grant him rehearing herein, and upon such rehearing to affirm the decision of the United States District Court for the Northern District of Illinois. In support of such request, Plaintiff respectfully suggests that the court has misapprehended and overlooked the controlling evidence in the record in this cause.

The Court recognizes, as cannot be disputed, that Plaintiff has a property in his tenured position as a school teacher for the